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9 UNITED STATES DISTRICT COURT  
10 NORTHERN DISTRICT OF OHIO  
11 EASTERN DIVISION

12 John Jackson,

13 Plaintiff,

14 vs.

15 Winking Lizard of Gateway, Inc., and  
16 Beachwood Winks, LLC,

17 Defendants.

No. \_\_\_\_\_

**COMPLAINT**

**(Demand for Jury Trial)**

18 COMES NOW Plaintiff, John Jackson (“Plaintiff”), individually, by and through the  
19 undersigned attorney and sues the Defendants, Winking Lizard of Gateway, Inc.  
20 (“Defendant Gateway”) and Beachwood Winks, LLC (“Defendant Beachwood”) (collectively, “Defendants”), and he alleges as follows:

**PRELIMINARY STATEMENT**

21 1. This is an action for unpaid wages, liquidated damages, attorneys’ fees, costs,  
22 and interest under the Fair Labor Standards Act (“FLSA”), as amended, 29 U.S.C. § 216(b).

23 2. The FLSA was enacted “to protect all covered workers from substandard  
24 wages and oppressive working hours.” Barrentine v. Ark Best Freight Sys. Inc., 450 U.S. 728,  
25  
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739 (1981). Under the FLSA, employers must pay all non-exempt employees a minimum wage of pay for all time spent working during their regular 40 hour workweeks. See 29 U.S.C. § 206(a). The FLSA’s definition of the term “wage,” in turn, recognizes that under certain circumstances, an employer of tipped employees may credit a portion of its employees’ tips against its minimum wage obligation, a practice commonly referred to as taking a “tip credit.” See id. § 203(m). The FLSA further recognizes that, under certain circumstances, an employee may be engaged in “dual jobs,” during which an employer may only impose a tip credit on an employee’s wages for time spent working while engaged in a tip-producing occupation. See 29 U.S.C. § 203(m). See also 29 C.F.R. § 531.56(e), Department of Labor Field Operations Handbook § 30d00(e).

### **JURISDICTION AND VENUE**

3. This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331 and 29 U.S.C. § 201, *et seq.* This civil action arises under the Constitution and law of the United States.

4. Venue is proper in this district pursuant to 28 U.S.C. § 1391(b)(ii) because acts giving rise to the claims of Plaintiff occurred within the Northern District of Ohio, and Defendants regularly conduct business in and have engaged in the wrongful conduct alleged herein – and, thus, are subject to personal jurisdiction in – this judicial district.

### **PARTIES**

5. At all material times, Plaintiff is an individual residing in Cuyahoga County, Ohio, and is a former employee of Defendants.

1           6.       At all material times, Defendant Gateway was a corporation duly licensed to  
2 transact business in the State of Ohio. Defendant Gateway does business, has offices,  
3 and/or maintains agents for the transaction of its customary business in Cuyahoga County,  
4 Ohio.

5           7.       At all relevant times, Plaintiff was an employee of Defendant Gateway. At all  
6 relevant times, Defendant Gateway, acting through its agents, representatives, employees,  
7 managers, members, and/or other representatives had the authority to hire and fire  
8 employees, supervised and controlled work schedules or the conditions of employment,  
9 determined the rate and method of payment, and maintained employment records in  
10 connection with Plaintiff's employment with Defendant Gateway. In any event, at all  
11 relevant times, Defendant Gateway was an employer subject to the Fair Labor Standards Act  
12 (FLSA) and employed Plaintiff.

13           8.       At all material times, Defendant Beachwood was a limited liability company  
14 duly licensed to transact business in the State of Ohio. Defendant Beachwood does business,  
15 has offices, and/or maintains agents for the transaction of its customary business in  
16 Cuyahoga County, Ohio.

17           9.       At all relevant times, Plaintiff was an "employee" of Winking Lizard of  
18 Gateway, Inc., and Beachwood Winks, LLC, as defined by the FLSA, 29 U.S.C. § 201, *et seq.*

19           10.      The provisions set forth in the FLSA, 29 U.S.C. § 201, *et seq.*, apply to Winking  
20 Lizard of Gateway, Inc., and Beachwood Winks, LLC.

12. Defendants individually and/or through an enterprise or agent, directed and exercised control over Plaintiff's work and wages at all relevant times.

13. Plaintiff, in his work for Defendants, was employed by an enterprise engaged in commerce that had annual gross sales of at least \$500,000.

14. Defendants own and/or operate as Winking Lizard of Gateway, Inc., an enterprise located in Cuyahoga County, Ohio.

15. Plaintiff was hired by Defendants as a tipped employee as defined by the FLSA, 29 U.S.C. § 201, *et seq.*, to work as a server, and Plaintiff worked for Defendants between approximately June 1, 2014 and July 31, 2014, when Plaintiff left his employment with Defendants.

16. Defendants own and/or operate as Beachwood Winks, LLC, an enterprise located in Cuyahoga County, Ohio.

17. Plaintiff was hired by Defendants as a tipped employee as defined by the FLSA, 29 U.S.C. § 201, *et seq.*, to work as a server, and Plaintiff worked for Defendants between approximately August 1, 2014 and May 31, 2015, when Plaintiff left his employment with Defendants.

1           18.     Rather than pay their tipped employees the applicable minimum wage, for the  
2 time Plaintiff was paid as a tipped employee, Defendants imposed a tip credit upon Plaintiff  
3 at below the applicable minimum wage.

4           19.     As a result of Defendant's imposition of a tip credit, Plaintiff was forced to  
5 perform work at an hourly rate that was less than the applicable minimum wage.  
6

7           20.     Defendants engaged in the regular practice of requiring Plaintiff to perform a  
8 substantial amount of non-tipped labor related to his tipped occupation in excess of 20% of  
9 his regular workweek and non-tipped labor unrelated to his tipped occupation over the  
10 course of his regular workweeks.

11           21.     Examples of non-tipped labor related to Plaintiff's tipped occupation that  
12 exceeded 20% of Plaintiff's regular workweek, include, but are not limited to: preparatory  
13 and workplace maintenance tasks such as brewing tea, brewing coffee, rolling silverware,  
14 cleaning soft drink dispensers, wiping down tables, setting tables, busing tables, cutting and  
15 stocking fruit, stocking ice, taking out trash, scrubbing walls, sweeping floors, restocking to-  
16 go supplies, cleaning booths, cleaning ramekins, sweeping, mopping, restocking all stations,  
17 washing dishes, and breaking down and cleaning the expo line.  
18

19           22.     Examples of non-tipped labor unrelated to Plaintiff's tipped occupation that  
20 Plaintiff performed during his regular workweeks, include, but are not limited to: preparatory  
21 and workplace maintenance tasks such as taking out trash, scrubbing walls, sweeping floors,  
22 cleaning booths, sweeping, mopping, washing dishes, breaking down and cleaning the expo  
23 line, restocking restrooms, and cleaning toilets, urinals, and restroom floors.  
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1           23. As a result of Defendants' willful requirement that Plaintiff perform a  
2 substantial amount of non-tipped labor related to his tipped occupation in excess of 20% of  
3 his regular workweeks and non-tipped labor unrelated to his tipped occupation over the  
4 course of his regular workweeks, Defendants paid Plaintiff less than the overall minimum  
5 wage for such work that Plaintiff performed for Defendants, such that the average of  
6 Plaintiff's hourly wages was less than the applicable minimum wage.  
7

8           24. In both policy and practice, Defendants regularly and consistently required  
9 Plaintiff to perform the above-listed non-tipped labor related to his tipped occupation in  
10 excess of twenty percent (20%) of Plaintiff's regular workweek before, during, and after  
11 scheduled shifts; before the restaurant was open to customers; after the restaurant was  
12 closed to customers; while Plaintiff had few to no customers to serve; before serving his first  
13 customer; and after being "cut" from serving customers.  
14

15           25. In both policy and practice, Defendants regularly and consistently required  
16 Plaintiff to perform the above-listed non-tipped labor unrelated to his tipped occupation  
17 during the course of Plaintiff's regular workweek before, during, and after scheduled shifts;  
18 before the restaurant was open to customers; after the restaurant was closed to customers;  
19 while Plaintiff had few to no customers to serve; before serving his first customer; and after  
20 being "cut" from serving customers.  
21

22           26. As a result of Defendants' requirement that Plaintiff perform such non-tipped  
23 labor related to his tipped occupation, and in excess of twenty percent (20%) of his regular  
24 workweek, while earning the reduced tip credit rate, Plaintiff was engaged in a non-tipped  
25 occupation, as defined by the "dual jobs" regulation 29 C.F.R. §§ 531.56(e) and (a) and the  
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1 Department of Labor Field Operations Handbook §30d00(e), for such work performed  
2 during that time. Such work performed by Plaintiff included, but was not limited to,  
3 spending more than part of his time cleaning and setting tables and making coffee, and more  
4 than occasionally washing dishes or glasses. As a result, Defendants were prohibited from  
5 taking the tip credit for the hours Plaintiff spent working in a non-tipped occupation.  
6 Plaintiff is, therefore, entitled, under 29 C.F.R. § 531.56(a) and 29 U.S.C. § 216(b), to the  
7 overall minimum wage for all time spent performing such non-tipped, dual occupation labor.  
8 As such, Defendants paid Plaintiff less than the overall minimum wage for the work Plaintiff  
9 performed during his regular workweek, in willful violation of the FLSA, 29 U.S.C. § 206(a).

10  
11 27. As a result of Defendants' requirement that Plaintiff perform such non-tipped  
12 labor unrelated to his tipped occupation, while earning the reduced tip credit rate, Plaintiff  
13 was engaged in a non-tipped occupation, as defined by the "dual jobs" regulation 29 C.F.R.  
14 §§ 531.56(e) and (a) and the Department of Labor Field Operations Handbook §30d00(e),  
15 for such work performed during that time. Such work performed by Plaintiff included, but  
16 was not limited to, spending more than part of his time cleaning and setting tables and  
17 making coffee, and more than occasionally washing dishes or glasses. As a result, Defendants  
18 were prohibited from taking the tip credit for the hours Plaintiff spent working in their non-  
19 tipped occupation. Plaintiff is, therefore, entitled, under 29 C.F.R. § 531.56(a), to the overall  
20 minimum wage for all time spent performing such non-tipped, dual occupation labor. As  
21 such, Defendants paid Plaintiff less than the overall minimum wage for the work Plaintiff  
22 performed during his regular workweek, in willful violation of the FLSA, 29 U.S.C. § 206(a).

1           28. As a result of Defendants' willful failure to compensate Plaintiff the applicable  
2 minimum wage for such hours worked, Defendants have violated 29 U.S.C. § 206(a).

3           29. Defendants knew that – or acted with reckless disregard as to whether – their  
4 failure to pay to Plaintiff the full applicable minimum wage, without applying the tip credit,  
5 for time spent performing labor in such a non-tipped occupation, would violate federal and  
6 state law, and Defendants were aware of the FLSA minimum wage requirements during  
7 Plaintiff's employment. As such, Defendants' conduct constitutes a willful violation of the  
8 FLSA.  
9

10           30. Defendants have and continue to willfully violate the FLSA by not paying  
11 Plaintiff the full applicable minimum wage for time spent performing non-tipped labor  
12 related to his tipped occupation in excess of 20% of his regular workweeks, and non-tipped  
13 labor unrelated to his tipped occupation over the course of his regular workweeks.  
14

15           31. In a given workweek, and during each and every workweek for which Plaintiff  
16 worked for Defendants as a tipped employee, Defendants required Plaintiff to perform a  
17 substantial amount of non-tipped labor related to his tipped occupation in excess of 20% of  
18 his regular workweek and non-tipped labor unrelated to his tipped occupation over the  
19 course of his regular workweek. Defendants paid Plaintiff less than the overall minimum  
20 wage for such work that Plaintiff performed for Defendants, such that the average of  
21 Plaintiff's hourly wages was less than the applicable minimum wage, in willful violation of 29  
22 U.S.C. § 206(a). Defendants required Plaintiff to perform non-tipped labor related to his  
23 tipped occupation in excess of 20% of his regular workweeks and non-tipped labor unrelated  
24 to his tipped occupation each and every workweek during which he worked for Defendants.  
25  
26  
27



1           32. Plaintiff believes and therefore avers that Defendants owe him similar wages  
2 for each and every workweek during which he worked for Defendants for the entire  
3 duration of his employment. Furthermore, when an employer fails to keep complete and  
4 accurate time records, employees may establish the hours worked by their testimony, and the  
5 burden of overcoming such testimony shifts to the employer.  
6

7           33. Defendants engaged in the regular practice of failing to accurately, if at all,  
8 record the time during which Defendants suffered or permitted Plaintiff to work. As such,  
9 Defendant's records of Plaintiff's time worked, if in existence, understate the duration of  
10 time each workweek that Defendants suffered or permitted Plaintiff to work.  
11

12           34. Plaintiff is a covered employee within the meaning of the Fair Labor  
13 Standards Act ("FLSA").

14           35. Plaintiff was a non-exempt employee.

15           36. Defendants refused and/or failed to properly disclose to or apprise Plaintiff of  
16 his rights under the FLSA.  
17

18           37. Defendants individually and/or through an enterprise or agent, directed and  
19 exercised control over Plaintiff's work and wages at all relevant times.

20           38. Due to Defendants' illegal wage practices, Plaintiff is entitled to recover from  
21 Defendants compensation for unpaid wages, an additional amount equal amount as  
22 liquidated damages, interest, and reasonable attorney's fees and costs of this action under 29  
23 U.S.C. § 216(b).  
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1           39. Plaintiff has retained The Bendau Law Firm, PLLC to represent him in this  
2 litigation and has agreed to pay a reasonable fee for the services rendered in the prosecution  
3 of this action on his behalf.

4                           **COUNT ONE: FAIR LABOR STANDARDS ACT**  
5           **NON-TIPPED LABOR RELATED TO TIPPED WORK IN EXCESS OF 20%**

6           40. Plaintiff realleges and incorporates by reference all allegations in all preceding  
7 paragraphs.

8           41. Defendants intentionally failed and/or refused to comply with the FLSA, 29  
9 U.S.C. § 201, *et seq.*, 29 C.F.R. § 531.56(e), and the Department of Labor Field Operations  
10 Handbook §30d00(e) by requiring Plaintiff in a given workweek, and during each and every  
11 workweek Plaintiff was employed by Defendants, to perform non-tipped labor related to his  
12 tipped occupation in excess of twenty percent (20%) of his regular 40-hour workweek, while  
13 paying Plaintiff at the tip credit rate.  
14

15           42. Defendants intentionally failed and/or refused to pay Plaintiff the full  
16 applicable minimum wage according to the provisions of the FLSA for time he spent  
17 performing non-tipped labor related to his tipped occupation in excess of twenty percent  
18 (20%) of a given workweek, for each and every workweek that Plaintiff was employed by  
19 Defendants, in violation of 29 U.S.C. § 206(a).  
20

21           43. As such, full applicable minimum wage for such time Plaintiff performed non-  
22 tipped labor related to his tipped occupation in excess of twenty percent (20%) of his regular  
23 workweek is owed to Plaintiff for each and every workweek he was employed by  
24 Defendants.  
25  
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44. Defendants knew that – or acted with reckless disregard as to whether – their failure to pay to Plaintiff the full applicable minimum wage, without applying the tip credit, for time spent performing labor in such a non-tipped occupation, would violate federal and state law, and Defendants were aware of the FLSA minimum wage requirements during Plaintiff's employment. As such, Defendants' conduct constitutes a willful violation of the FLSA.

45. Plaintiff is therefore entitled to compensation for the full minimum wage at an hourly rate, to be proven at trial, plus an additional equal amount as liquidated damages, together with interest, reasonable attorney's fees, and costs.

**WHEREFORE**, Plaintiff, John Jackson, individually, respectfully requests that this Court grant relief in Plaintiff's favor, and against Defendants Winking Lizard of Gateway, Inc., and Beachwood Winks, LLC for compensation for unpaid minimum wages, plus an additional equal amount as liquidated damages, prejudgment and post-judgment interest, reasonable attorney fees, costs, and disbursements of this action, and any additional relief this Court deems just and proper.

**COUNT TWO: FAIR LABOR STANDARDS ACT**  
**NON-TIPPED LABOR UNRELATED TO TIPPED WORK**

46. Plaintiff realleges and incorporates by reference all allegations in all preceding paragraphs.

47. Defendants intentionally failed and/or refused to comply with the FLSA, 29 U.S.C. § 201, *et seq.*, 29 C.F.R. § 531.56(e), and the Department of Labor Field Operations Handbook §30d00(e) by requiring Plaintiff in a given workweek, and during each and every workweek Plaintiff was employed by Defendants, to perform non-tipped labor unrelated to

1 his tipped occupation over the course of his regular 40-hour workweek, while paying  
2 Plaintiff at the tip credit rate.

3 48. Defendants intentionally failed and/or refused to pay Plaintiff the full  
4 applicable minimum wage according to the provisions of the FLSA for time he spent  
5 performing non-tipped labor unrelated to his tipped occupation over the course of a given  
6 workweek, for each and every workweek that Plaintiff was employed by Defendants, in  
7 violation of 29 U.S.C. § 206(a).  
8

9 49. As such, full applicable minimum wage for such time Plaintiff performed non-  
10 tipped labor unrelated to his tipped occupation over the course of his regular workweek is  
11 owed to Plaintiff for each and every workweek he was employed by Defendants.  
12

13 50. Defendants knew that – or acted with reckless disregard as to whether – their  
14 failure to pay to Plaintiff the full applicable minimum wage, without applying the tip credit,  
15 for time spent performing labor in such a non-tipped occupation, would violate federal and  
16 state law, and Defendants were aware of the FLSA minimum wage requirements during  
17 Plaintiff's employment. As such, Defendants' conduct constitutes a willful violation of the  
18 FLSA.  
19

20 51. Plaintiff is therefore entitled to compensation for the full minimum wage at an  
21 hourly rate, to be proven at trial, plus an additional equal amount as liquidated damages,  
22 together with interest, reasonable attorney's fees, and costs.  
23

24 **WHEREFORE**, Plaintiff, John Jackson, individually, respectfully requests that this  
25 Court grant relief in Plaintiff's favor, and against Defendants Winking Lizard of Gateway,  
26 Inc., and Beachwood Winks, LLC for compensation for unpaid minimum wages, plus an  
27

1 additional equal amount as liquidated damages, prejudgment and post-judgment interest,  
2 reasonable attorney fees, costs, and disbursements of this action, and any additional relief  
3 this Court deems just and proper.

4 **JURY TRIAL DEMAND**

5 Plaintiff hereby demands a trial by jury on all issues so triable.

6  
7 RESPECTFULLY SUBMITTED this 20<sup>th</sup> Day of October 2015.

8  
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